WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VERNA LISA CALLEROS, *Applicant*

vs.

SHUTTERFLY AND LIFETOUCH, INC.;
AMERICAN ZURICH INSURANCE COMPANY,
administered by CCMSI, *Defendants*

Adjudication Number: ADJ12903013
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the February 23, 2024 Findings, Award and Orders wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained admitted industrial injury to the cervical spine. The WCJ further found that the injury herein caused 11% permanent disability after valid legal apportionment.

We did not receive an answer. The WCJ prepared a Report and Recommendation in Response to Applicant's Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

The WCJ provided the following factual background in his Report:

BACKGROUND

This case was submitted on the record at a trial on November 30, 2023 without any testimony. (Minutes of Hearing (MOH) dated 11/30/23 at p. 1, FA&O at p. 3.) The issues for determination were: 1. Whether the AME's apportionment opinion was substantial medical evidence and legally valid; 2. Defendant's claim of PD overpayment in the sum of $7,217.34, in the event the AME's apportionment opinion is found to be valid; 3. The need for further medical treatment; and 4. Applicant's penalty claim for unreasonably delay in providing the Applicant with the SDJB voucher. (MOH at pp. 2-3, FA&O at p 3.) Most of the basic facts are undisputed. The Applicant was employed by Shutterfly & Lifetouch as a photographer who took school pictures and sustained an accepted industrial injury to her neck on October 21, 2019, when as a passenger in a car that suddenly braked, she was struck in the back of the neck by a metal tripod behind her which had not been properly secured. (FA&O at p. 4.) She subsequently underwent surgery with Dr. Vikram Talwar on September 21, 2021 in the form of a C4-C5 anterior discectomy and fusion, and the associated removal of hardware from a prior C5 to C7 fusion. (***Id.***) That earlier cervical fusion was provided on an industrial basis in connection with a 2014 injury at Foods International, and that claim was settled via an $80,000.00 Compromise & Release (C&R) approved on July 5, 2017. (***Id.***) I took judicial notice of that settlement, which is also in evidence as Joint Exhibit 104, and the Applicant was represented in that case by current counsel, Mr. Thornton. (***Id.***) That C&R was based on the AME reporting of orthopedist Stephen Conrad, M.D., whose opinions rated the cervical and thoracic spine PD in that claim to 43% PD. (***Id.*** at pp. 4-5.)

The AME in this case is orthopedist Victoria Barber, M.D., who was also Dr. Conrad's long time professional partner before his recent retirement. In her initial report dated September 12, 2022, she provided a 38 whole person impairment (WPI) rating applying a strict rating of the AMA Guides 5th Edition, and she found that an *Almaraz/Guzman* rating was not necessary. (***Id.*** at p. 5, Joint 101, Report of 9/12/22 at pp. 12-13.)

In the Opinion on Decision at pages 5-6, I quoted from her initial report on apportionment as follows, "[I]t is my opinion that the prior injury [for which she reviewed medical records, including two AME reports of Dr. Conrad], is significant to current impairment. There is indication that future care and use of oral analgesics, and the combination with the expected waxing and waning of symptoms over time following the initial 2014 injury make apportionment appropriate in this case. For that reason, I would apportion 80% of the disability to the prior industrial claim which occurred in 2014, and 20% to the 2019 claim." (Joint 101, Report of 9/12/22 at p. 14.) In her supplemental report dated January 26, 2023, Dr. Barber reviews and summarizes an additional 20 pages of medical records, which are mostly MRI, CT, and x-rays of the cervical spine obtained over time and most recently as of

July 12, 2022, and she does not change her opinion on apportionment. (Joint 101, Report of 1/26/23.) She concludes, "It remains my opinion that 80% is apportioned to the prior injury in 2014 and 20% to the 2019 claim. The level adjacent to her fused level is often affected and natural progression of disease process. However, the event of October 21, 2019 did indeed contribute to the overall cervical disability. For this reason the apportionment as indicated in my earlier report remains unchanged." (***Id.*** at p. 3.)

In my discussion of the substantialness and legal validity of that opinion in the FA&O, I wrote,

> "The parties stipulated that the AME's rating after adjustment for age and occupation and before apportionment is 57% PD. (MOH at p. 2, Stipulation No. 6.) Applicant's trial brief at pp. 2-3 argues that Dr. Barber's apportionment opinion is not substantial medical evidence because it does not sufficiently explain how or why she attributes 80% of the current PD to the prior injury under *Escobedo*. It also asserts that Dr. Barber did not review one of the prior AME reports of Dr. Conrad dated December 6, 2016, when Dr. Conrad provided his own opinion that 10% of the PD from the 2014 injury was apportionable to non-industrial causes, which included a series of earlier motor vehicle accidents and preexisting pathology in the neck. (Joint 102, Report of 12/6/16 pp. 5-6.) It appears from Dr. Barber's initial report dated September 12, 2022 (Joint 102), that although Dr. Barber reviewed two of Dr. Conrad's reports dated September 20, 2016 and February 1, 2017, she did not summarize, and presumably did not review the report of December 6, 2016 where he provides his apportionment opinion.
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> As noted, it is the defendant's burden to establish valid apportionment, which must be based on substantial medical evidence. Defendant points out in its trial brief at p. 2, that aside from the obvious multilevel prior fusion, that Dr. Barber reviewed MRIs of the cervical spine dated February 13, 2014, and August 19, 2015, which pre-date the October 21, 2019 date of injury in this case, and document degenerative changes and a annular disc bulge at C4-5, as well as a C5-6 broad based disc bulge with osteophyte complex, prominent on the right. (Joint 101, Report of 9/12/22 at p. 11.) Having reviewed the entire record, I find and conclude that the defendant has met that burden. Dr. Barber, over the course of her two reports, found 80% apportionment to the prior injuries and related multilevel fusion, and did not change her opinion after review of additional records.
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> In the first report (Joint 101, 9/12/22, at page 14) quoted above, Dr. Barber relies on a rationale that the Applicant had continuing use of analgesics and waxing and waning symptoms related to the prior surgery for her rationale. In her second report, she further expanded on her reasoning and noted that the initial fusion often affects and causes "natural

> progression of the disease process" in the adjacent levels of the cervical spine. (Joint 101, Report of 1/26/23.) Although Applicant's trial brief asserts this record is insufficient under *Escobedo*, I disagree, and find and conclude that is it sufficiently explained to constitute substantial medical evidence. There is significant evidence of prior compromise of the cervical spine including the pre-injury multilevel fusion, pre-injury MRI documentation of significant pathology, including levels of C4-5, which were not the subject to the first surgery, and evidence of continuing symptoms in the neck after the first surgery, which Dr. Barber reviewed and considered formulating her opinion on apportionment. The fact there was an $80,000.00 C&R of the prior 2014 injury, which reflects medical paid in that case of $64,880.06, (Joint 104 at p. 5), is also an indication of how serious that prior injury was." (FA&O at pp. 7-8.)

> As discussed in more detail below, that remains my opinion and nothing in Applicant's Petition persuades me otherwise. The prior 2014 injury was significantly disabling, required extensive medical treatment including a multilevel cervical fusion, and Dr. Barber had the benefit of reviewing extensive medical records related to the prior claim, including AME reports from Dr. Conrad that were the basis of the prior C&R. As I noted in the FA&O at p. 9, I rejected defendant's alternative theory of Labor Code section 4664 apportionment based on the claimed ratings of the AME reports of Dr. Conrad in the prior case, as that claim settled by C&R with no stipulation as to the exact level of PD.

I.

We highlight the following legal principles that may be relevant to our review of this matter:

An award, order or decision by the Appeals Board must be supported by substantial evidence considering the entire record. (Lab. Code, §§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd*. (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Apportionment is the process utilized to separate permanent disability caused by an industrial injury from the disability attributable to other industrial injuries or to nonindustrial factors. Employers must compensate injured workers only for the portion of permanent disability attributable to the current industrial injury, not for the portion attributable to previous injuries or nonindustrial factors. (Lab. Code, §§ 4663, 4664; *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565].) To constitute substantial evidence as to the issue of apportionment, the medical opinion must disclose the reporting physician's familiarity with the concepts of apportionment and must identify the

approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) The physician must also explain the nature of the other factors, how and why those factors were causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned by the physician. (*Id*. at 621.)

In this case, it is unclear from our preliminary review of the evidence and the existing record as to whether substantial medical evidence exists to support the finding of apportionment. Therefore, taking into account the statutory time constraints for acting on the petitions, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case.

II.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp*. *Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*. (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp*. *Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

III.

Accordingly, we grant applicant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for

Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 6, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

VERNA LISA CALLEROS
LAW OFFICES OF BRIAN THORNTON
LLARENA, MURDOCK, LOPEZ & AZIZAD

PAG/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*